

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of:)	
)	
Schools and Libraries Universal Service)	
Support Mechanism)	CC Docket No. 02-6
)	
Comments on the Universal Service)	
Administrative Company's Audit Resolution Plan)	
)	

The following comments are submitted in response to the Commission's request for comments on the Universal Service Administrative Company's Audit Resolution Plan.

E-Rate Central is an independent firm providing E-rate application services to public and private schools. E-Rate Central has been an active member of the State E-Rate Coordinators' Alliance ("SECA") and was also represented on the SLD's 2003 Task Force for the Prevention of Waste, Fraud and Abuse.

COMMENTS

- 1. The resolution of audit findings involving program rule violations needs to address rule interpretations and guidance that were in effect as of the period being audited. To facilitate this process, the SLD should be required to publicly maintain an archive of training and Web site material.**

The proposed Audit Resolution Plan indicates that rule violations will be considered in the context of the rules that were "...in effect for the funding year at issue." This is both fair and proper.

Many E-rate rules, however, have been subject to periodic changes in interpretations that have major compliance implications when viewed in hindsight. Two examples of changing interpretations of longstanding rules are:

- a. Technology plan requirements. Since the beginning of the program, E-rate rules required applicants to have approved technology plans for all but basic telephone services. Instructions dealing with when such plans must be available and/or approved have constantly been revised.

Until the FCC's recent Fifth Order, FCC language required plan approval prior to the filing of a Form 470. Until recent form revisions, however, certifications and instructions in the Form 470 and Form 471 required only that a technology plan would be approved. The first time an applicant was actually required to certify that it had an approved plan was when it filed a Form 486 after funding had been approved. At some point, with very little public guidance and although the Form 486 did not so state, the SLD began indicating that an applicant's plan must be approved as of the Service Start Date, rather than the Form 486 submission date (often well after service has started).

With the Fifth Order, the FCC clarified that the plan had to be approved by the start of service, but that a plan (approved or otherwise) is "expected" to be developed prior to the Form 470 filing. Although the certification language in a new draft Form 470 has been changed to reflect this interpretation, the new Form 470 has not yet been released.

- b. Contracts: With few exceptions, E-rate rules have always required that an applicant have actual contracts in place before filing a Form 471 application. The definition of what constitutes a "contract," however, has also been a moving target.

Early SLD review practices appeared to accept a vendor quote and/or purchase order as indications of a contract. Less than two years ago, the SLD began discussing a valid contract in terms of state contract law — without providing any guidance on such state-specific definitions — and within the context of a "legally binding agreement." SLD guidance for the FY 2004 application period indicated that contracts must, at a minimum, be signed by the applicant.

For the FY 2005 application period, the SLD appears to have gotten away from the "agreement" portion of the contract definition and is now indicating that a valid contract must be signed by both the applicant and the service provider. This guidance was provided in a SLD training session in September 2004, and is generally available only to applicants willing to wade through PowerPoint training slides on the SLD Web site.

E-Rate Central believes that audit compliance should be evaluated, not only in terms of the rules that were in effect for the appropriate funding year, but in terms of the interpretations and guidance that were broadly available at that time.

To provide a fair and adequate opportunity for an applicant to respond to a potentially negative audit report, the SLD should be required to publicly archive copies of earlier training materials, Web site postings, form instructions, and Eligible Services Lists. The SLD's archiving requirement should parallel the five year records retention requirement that applies to applicants.

2. A better process is needed to resolve audit issues (and appeals) requiring FCC WCB guidance.

The proposed Audit Resolution Plan provides a realistic timeframe for the delivery of a Final Audit Report, except in cases requiring guidance from the FCC's Wireline Competition Bureau ("WCB").¹ In such cases, "...USAC proposes to formalize its communications by use of a form that would indicate a proposed deadline for response from WCB."

E-Rate Central believes that timely WCB guidance and/or appeal decisions on E-rate issues is a serious problem that goes far beyond the delivery of audit reports. Two recent indications of the problem are:

- a. The final release of the Eligible Services List for FY 2005 by the WCB delayed the opening of the Form 471 application window from early November to mid-December.
- b. There is a growing backlog of appeals at the FCC. Although there have been a few simple procedural decisions released lately, there have been virtually none involving substantive issues in 2004. While appeals generally are filed by specific applicants, the issues involved often have broad implications affecting classes of appeals being held by the SLD awaiting precedent-setting FCC decisions. A good example is the longstanding appeal on the applicability of "unsubstantiated charges" in the context of the SLD's 30% denial rule.

E-Rate Central fully recognizes that WCB delays involve serious resource allocation problems. It is hard to believe, however, that USAC's institution of a proposed deadline "form" will do anything other than formally shift the blame for delays from the SLD to the WCB. More formal rules for FCC appeal resolution, for example, seem to have had little effect on the decision backlog.

Perhaps a more practical and broader approach is to recognize that delays are likely to persist and to find a better way to manage outstanding issues. We believe that the SLD, in concert with the WCB, should develop a prioritized list of pending appeal, audit, and other policy issues and mutually agree on a timetable for resolution. One solution may be to assign greater authority to the SLD to propose and draft recommended decisions to the WCB.

¹ It would be interesting to know what type of audit issue would require FCC guidance. If an issue requires the interpretation of an E-rate rule, to determine if there had been a program violation, then we would argue that the applicant should not be held accountable for the failure to comply with a rule that was not, during the funding year at issue, or even now, properly defined. This would be an extreme example of the changing interpretation issue discussed in our first comment.

3. Information on Non-Compliant Auditee Letters must be made more broadly available to applicants and vendors.

Based on WCB approval last October, the SLD began issuing Non-Compliant Auditee Letters to applicants that failed a formal audit or, when the failure was deemed to be the service providers' fault, to the vendors themselves. In either case, the letters notify the affected parties that the SLD will take no action on any of their pending or future funding requests until the applicants or vendors have demonstrated compliance. This could lead to holds on funding commitments of six months or more.


Delays in funding commitments are clearly a serious problem, not only for the applicant or vendor in question, but for the applicants' vendors or the vendors' customers. In recognition of this problem, the SLD sends copies of the Non-Compliant Auditee Letters to the respective applicants or vendors as determined by pending funding requests. It is important to note, however, that the SLD has not announced plans to otherwise publicize applicant or vendor-related FRNs that have been put on hold. As a result, potential new customers of non-compliant vendors (or, conversely, potential new vendors of non-compliant applicants) will have to rely upon their own inquiries, perhaps requiring certifications of good standing in the E-rate program.

E-Rate Central believes that SLD decisions in non-compliant audit situations — or similarly in FCC red light cases — must be made fully available to the applicant and vendor communities.

SUMMARY

USAC's Audit Resolution Plan proposal raises other issues that should be reviewed in light of program rule interpretations, decision delays, and public disclosures. E-Rate Central encourages the WCB to review the Plan from this broader perspective.

Respectfully submitted,



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